In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 972.

THEODORE C. McBRIDE,
Petitioner,

vs.

THE TOLEDO TERMINAL RAILROAD COMPANY,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

There are only two questions presented for review. The first is whether the Supreme Court of Ohio, the dissenting judge of the Court of Appeals of Lucas County, Ohio, and the trial court were correct in their decisions that the jury verdict was not sustained by the evidence. The second question is whether this case comes within the certiorari jurisdiction of this Court.

STATUTES INVOLVED.

The only statutes other than the Federal Employers' Liability Act involved in this appeal are the Ohio statutes providing for special findings by a jury on "particular questions of fact" and the Ohio statutes referring to motions after judgment. Sections 2315.16, 2323.18 and 2323.181, Ohio Revised Code.

In his brief, petitioner has erroneously quoted the amended form of Section 2315.16 of the Ohio Revised Code rather than the form of that statute in force at the time of trial. The correct quotation of this statute appears in Appendix A of this brief, page 14.

STATEMENT OF THE CASE.

A. Developments in Courts Below.

Petitioner brought this action for damages for personal injuries under the Federal Employers' Liability Act (45 U. S. C. Section 51). He is an employee of The Toledo Terminal Railroad Company and claimed that he was injured on January 31, 1951, while working at the Rossford Yard of the respondent railroad. He stated that as he was climbing down a ladder on the side of a boxcar, one of his feet slipped off a ladder rung causing injury to his back.

This case was tried in the Common Pleas Court of Lucas County, Ohio. The jury returned a general verdict for the petitioner and, in answer to special questions, found (1) that the respondent was negligent in only one of the respects alleged in the petition and (2) that petitioner was guilty of contributory negligence to the extent of 40%. Judgment was entered on the verdict.

The respondent filed a motion for judgment and a motion for a new trial. Pursuant to Section 2323.181, Ohio Revised Code, the trial court ruled on both motions. He first granted judgment for the respondent notwithstanding the verdict, (R. 12) and later granted the motion for new trial conditioned upon the possible reversal of the judgment for the respondent. (R. 12-13.)

The petitioner took separate appeals from (1) the judgment for the defendant and (2) the order granting a new trial. After hearing, the Court of Appeals of Lucas County, Ohio (with Judge Lehr Fess dissenting) first reversed the judgment for the respondent notwithstanding the verdict. (R. 275.) Contrary to petitioner's statement (page 12 Petition for Certiorari), this Court did not restore any judgment for him because, finding no abuse of discretion, it dismissed the appeal from the order granting

a new trial "for want of jurisdiction" (not an appealable order).

The Supreme Court of Ohio, without dissent and in a *per curiam* opinion, held (1) that "the Court of Appeals was not in error in dismissing the plaintiff's appeal" from the order granting a new trial and (2) that "there was no proof of proximate causation." It affirmed the judgment of the trial court and entered final judgment for the respondent.

The dissenting opinion of Judge Lehr Fess was, in effect, adopted by the Supreme Court of Ohio. See *McBride vs. Toledo Terminal Rd. Co.*, 166 Ohio St. 129, 131, 140 N. E. 2d 319.

The issue as to the sufficiency of the evidence in this case has been considered by one trial court and two appellate courts and opinions have been written by all of these courts. They are set out in the appendices to the petition for certiorari.

B. Undisputed Facts.

The operative facts of petitioner's claim are very simple and, considering the allegations of the amended petition, the jury's answers to special questions and the admissions of the petitioner, they are undisputed and uncontradicted.

In his amended petition, McBride alleged very specific negligence. (R.3.) He stated that the respondent "knowingly caused and permitted the plaintiff to work in a place and under conditions that were unsafe * * * in each of the following particulars" (1) ice on ladder rungs on railroad cars, (2) insufficient lighting and (3) footwear insufficient for traction. He made no general claim that he was not furnished a safe place to work.

In response to special questions on respondent's negligence, the jury found that the only particular in which petitioner's place of work was unsafe was the lack of lighting. The jury's answer to this interrogatory was "no lighting—not a safe place to work." (R. 250.)

In his testimony, the petitioner admitted without qualification that as he was climbing down the boxcar ladder, *he was not able to see* the rungs below him and *could not* and *did not look at them.* (R. 119, 121.)

Petitioner testified that his foot slipped off the rung of a ladder on the side of a boxcar (No. 18 as cars are numbered on Deft's Ex. No. 1, R. 253) when he was climbing down this ladder at about 5:45 a. m. on January 31, 1951. The boxcar and ladder are illustrated by a photograph which is Deft's Ex. No. 2. (R. 255.)

Petitioner had started to work for the Toledo Terminal in 1947. (R. 67.) On January 31, 1951, he was a conductor in charge of the yard crew at the respondent's Rossford Yards. (R. 68.)

McBride and his crew started to work on the night before at about 10:30 p. m. They first checked the cars (all boxcars, R. 49) in the yard and then commenced sorting, classifying and switching the cars in the yard for placement on the track of the Larrowe Milling Company. (R. 69.) In the course of the night's work, McBride climbed up and down the ladders of many cars without difficulty. (R. 74, 75, 101, 103; 105, 110, 111.) In fact, he had climbed up and down the ladder in issue earlier in the night without slipping or other mishap. (R. 110.)

Shortly before petitioner's mishap, a cut of cars was moved into track No. 7. Boxcar No. 18 was the lead car. McBride was some distance back from the standing cars when car No. 18 was approaching. He swung onto the stirrup of the ladder at the lead end of the car as it was

moving past and rode on this ladder while No. 18 was coupled onto the standing cars. (R. 104, 112.)

McBride then climbed the ladder to reach the top of car No. 18 and released the brake on that car. (R. 105.) He gave a back-up signal, and he was still standing on the ladder when this move was started. (R. 107.) He stated that he observed that car No. 21 was not moving with the cut of cars, and he started down the ladder while the cut of cars was moving. (R. 107.)

It was at this point that McBride said that he slipped. (R. 76.) He said "the rung and ladder were icy; my foot gave away on the ice." (R. 73.) He caught himself with one hand, "regained" his footing and continued down the ladder. (R. 73.)

ARGUMENT.

A. Summary.

Under the Federal Employers' Liability Act, the employer is not an insurer of the safety of its employees. This Act requires proof of negligence and proximate cause. When there is no probative evidence on either one of these issues, the defendant is entitled to judgment as in any other negligence case. Title 45 U. S. C. Section 51; *Herdman vs. Pennsylvania Rd. Co.*, 352 U. S. 518; *Moore vs. Chesapeake & Ohio Ry. Co.*, 340 U. S. 573; *Eckenrode vs. Pennsylvania Rd. Co.*, 335 U. S. 329; *Brady vs. Southern Ry. Co.*, 320 U. S. 476.

Petitioner, in his amended petition (and not the Supreme Court of Ohio) limited his claims narrowly. He made *no general allegation* that respondent failed to furnish a safe place to work. Under uniform trial practice, both the evidence and recovery were limited to the specifications in the petition. 71 C. J. S. 1098, Section 531; *Horvath vs. McCord Radiator Co.*, 100 F. 2d 326, 337, cert.

den. 308 U. S. 581; *Winzeler, etc. vs. Knox*, 109 Ohio St. 503, 517, 143 N. E. 24.

The jury found for petitioner in only one "particular," "no lighting." This constituted a jury finding against the petitioner on the other particulars alleged. *St. Louis-San Francisco Ry. Co. vs. Simons*, 176 F. 2d 654, 658; *Container Patents Corp. vs. Stant*, 143 F. 2d 170, 172; cert. den. 323 U. S. 734; *Masters vs. New York Central Rd. Co.* 147 Ohio St. 293, 298, 70 N. E. 2d 898.

The testimonial admissions of petitioner "establish the facts" that he could not and did not look at the rung of the ladder from which he slipped. (R. 119, 121.) *Kansas Transport Co. vs. Browning*, 219 F. 2d 890, 893; *Winkler vs. City of Columbus*, 149 Ohio St. 39, 77 N. E. 2d 461; 32 C. J. S. 1110, Section 1040. These and other related admissions in the record completely negative any causal relationship between "no lighting" and the mishap of which petitioner complains.

This case was fully tried to a jury and rightly decided by the Supreme Court of Ohio which correctly applied the appropriate principles of law to the issues of this case. It does not come within the certiorari jurisdiction in this Court. Rule 19 of the Revised Rules of the Supreme Court of the United States; *Rogers vs. Missouri Pacific Rd. Co.*, 352 U. S. 500, 524 ff.

B. Petitioner's Questions 1, 2 and 3.

Petitioner has attacked the decision of the Ohio Supreme Court with inaccurate and incomplete statements about its opinion and judgment and the considerations on which they are based. This technique is futile when the opinion and the record are themselves examined. The validity of the lower court's decision rests upon the evi-

dence and the application of fundamental principles of law to it.

The respondent is not an insurer of its employees, inasmuch as liability under the Federal Employers' Liability Act arises from negligence, not from injury. Title 45 U. S. C. Section 51; *Moore vs. Chesapeake & Ohio Ry. Co.*, 340 U. S. 573; *Brady vs. Southern Ry. Co.*, 320 U. S. 476. It was the responsibility of the lower courts to apply the negligence test honestly and not to pretend that there was sufficient evidence of negligence when none had been presented. *Eckenrode vs. Pennsylvania Rd. Co.*, 164 F. 2d 996; Affm'd 335 U. S. 329. This Court, in *Brady vs. Southern Ry. Co.*, 320 U. S. 476, 479, 483, very clearly prescribed the standard against which the evidence must be tested upon a motion for a directed verdict in Federal Employers' Liability Act cases:

> "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. * * * When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. * * *
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> * * * * *
>
> "* * * The rule as to when a directed verdict is proper heretofore referred to, is applicable to questions of proximate cause."

A fortiori, when there is no evidence of proximate cause as the Ohio trial and Supreme Courts found, the same result follows. *Herdman vs. Pennsylvania Rd. Co.*, 352 U. S. 518.

Petitioner states that the Ohio Supreme Court vacated a verdict and judgment for the petitioner. This is not correct. No judgment had been restored to the petitioner by the Court of Appeals and there was no judgment for petitioner in existence which could have been vacated by the Ohio court.

Petitioner argues that the Ohio court did not apply the appropriate principles of law in reaching its judgment. In this he is mistaken. The Ohio court stated as its guide the substance of the rule quoted above from the case of *Brady vs. Southern Ry. Co.*, 320 U. S. 476. See 166 Ohio St. 129, 131, where the Ohio court said:

> "Reduced to its lowest terms, the precise question is whether the record discloses evidence from which reasonable minds may reach different conclusions as to proximate causation between the plaintiff's injuries and the defendant's negligence in failing to provide adequate lighting."

The court's conclusion was, however, not that reasonable minds could not differ, but that there was *no proof of proximate causation*. At page 130 of its opinion, the Ohio court said:

> "The defendant's appeal involves no disputed rule of law. The sole question is whether this record discloses evidence requiring submission of this case to the jury.
>
> "The trial court held that there was no proof either of proximate causation or of negligence on the part of the defendant.

> "In the Court of Appeals the dissenting judge agreed with the trial court that there was *no proof* of proximate causation. *This court concurs in that conclusion.*" (Emphasis added.)

As in the *Herdman* case, 352 U. S. 518, the Ohio court based its decision largely on the admissions of the petitioner which are quoted at page 131 of its opinion.

Petitioner complains that the Ohio court unfairly construed the jury's answer to the negligence interrogatory. On the contrary, considering the pleadings, the evidence, petitioner's admissions and the issues submitted to the jury, it gave the only fair and reasonable meaning which was possible. It said:

> "In response to three submitted interrogatories, the jury found the defendant negligent in but one respect, namely, insufficient lighting to afford a safe place to work."

The petition filed in this case, as we have said before, did not contain any general allegation that respondent failed to furnish a safe place to work. Petitioner stated the very limited and specific allegation that he was required to work in a place which was "unsafe" in three "particulars," (1) ice on ladder rungs, (2) insufficient lighting and (3) insufficient footwear. (R. 3.)

Under uniform trial practice, both the evidence and recovery were limited to these specifications in the petition. 71 *C. J. S.* 1098, Section 531; *Horvath vs. McCord Radiator Co.*, 100 F. 2d 326, 337, cert. den. 308 U. S. 581; *Winzeler, etc. vs. Knox*, 109 Ohio St. 503, 517, 143 N. E. 24. As stated in 71 *C. J. S.* 1098, Section 531:

> "Since a party must succeed, if at all, on the case, claim, or defense set up in the pleadings, regardless

of what is disclosed or established by the evidence, proofs, in order to be effectual, must correspond substantially with the allegations of the pleadings. This is true under the codes as well as under the old system of pleading."

As to the three claims of negligence stated in the petition, the jury found the place of work "unsafe" in only one "particular," "no lighting." This constituted a finding against the plaintiff on the other particulars alleged. *St. Louis-San Francisco Ry. Co. vs. Simons*, 176 F. 2d 654, 658; *Container Patents Corp. vs. Stant*, 143 F. 2d 170, 172; cert. den. 323 U. S. 734; *Masters vs. New York Central Rd. Co.*, 147 O. S. 293, 298, 70 N. E. 2d 898. As stated in the case of *Container Patents Corp. vs. Stant, supra*, "the absence of any findings * * * (of the court) thereon is equivalent to a finding against the" party, "whose burden it was to sustain this proposition."

This jury's answer together with petitioner's admissions in the pleadings and his testimony that he could not and did not look at the ladder rung from which he slipped (R. 119-121) led the Ohio Supreme Court to agree with Judge Lehr Fess of the Court of Appeals in the conclusions that: "It is common knowledge that one experienced in the use of ladders does not look his way up or down but feels his way up and down. * * * It is inconceivable that the absence of sufficient artificial lighting would even be a factor causing his foot to slip."

This record discloses no probative evidence from which fair-minded men could draw a reasonable inference that there was any relationship between lack of lighting and petitioner's foot slipping from the ladder rung. *Brady vs. Southern Ry. Co.*, 320 U. S. 476; *Herdman vs. Pennsylvania Rd. Co.*, 352 U. S. 518.

It would unnecessarily extend this brief to discuss all the authorities cited by petitioner. However, it should be stated that the doctrine of "unitary negligence" set out in *Union Pacific Co. vs. Hadley*, 246 U. S. 330, is not applicable. This case was submitted to the jury on specific claims which were tested by interrogatory.

The case of *Panhandle & Santa Fe Ry. Co. vs. Arnold*, 283 S. W. 2d 303; cert. granted 352 U. S. 820, decided May 13, 1957, is different in several important respects. First, the Arnold petition specified an independent claim of negligence that the defendant failed to furnish a safe place to work. The McBride petition did not do so. Second, the Arnold jury made an unqualified finding that defendant had not furnished a safe place to work. The McBride jury limited its finding to the allegation of "no lighting." Third, the Arnold decision dealt with a claim of inconsistent jury findings. The McBride decision was that there is no evidence to sustain the jury's finding. Fourth, the Arnold decision did not involve admissions of plaintiff. The McBride decision was based on such admissions.

C. Petitioner's Question No. 4.

Under the Ohio procedure, a party may file a motion for judgment and a motion for new trial within ten days after the entry of judgment. Sections 2321.17, 2323.181, Ohio Revised Code. Under the latter section, if both motions are filed, the trial court is directed to rule upon the motion for judgment first and the motion for new trial second. The time for perfecting an appeal is delayed until after the court's ruling on the second of these motions. Section 2505.07, Ohio Revised Code. The Supreme Court of Ohio recognized that the trial court proceeded in accordance with these statutes.

And, contrary to petitioner's assertion, the trial judge did not grant the new trial on the same grounds on which he granted respondent's motion for judgment. (R. 13-14.)

These are matters of Ohio practice and procedure and have been approved by the Supreme Court of Ohio.

D. Petitioner's Question No. 5.

Petitioner complains that the trial court refused to submit to the jury a claimed violation of the Safety Appliance Act. 45 U. S. C., Sec. 2. Such action, if erroneous, would have afforded grounds for a new trial, but cannot be considered in support of a verdict or judgment which was not in any way based on it.

Petitioner at no time sought a new trial of this cause and, in fact, does not now seek a new trial.

E. No Jurisdiction for Certiorari.

This Court has recently reviewed its policy with respect to Rule 19 of the Revised Rules of the Supreme Court of the United States and cases arising under the Federal Employers' Liability Act. *Rogers vs. Missouri Pacific Ry. Co.*, 352 U. S. 500, 524 ff.

The two Ohio appellate courts which have considered this case show by their opinions that they observed the doctrines established by the decisions of this Court. Their conclusions apply only to the particular pleadings, interrogatories and testimonial admissions shown in this record. They have no effect or meaning beyond the borders of this lawsuit. This lawsuit was correctly decided and

does not properly come within the purview of the policy stated in Rule 19 of the Revised Rules of this Court.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

Section 2315.16 Ohio Revised Code.

"§ 2315.16. Finding on questions of fact; journal entry.

"When either party requests it, the court shall instruct the jurors, if they render a general verdict, specially to find upon particular questions of fact, to be stated in writing, and shall direct a written finding thereon. The verdict and finding must be entered on the journal and filed with the clerk."